Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd (formerly known as United Malayan Insurance Co Bhd)

HIGH COURT (KUALA LUMPUR) — SUIT NO S1–22–26 OF 1995
ABDUL MALIK ISHAK J
1 DECEMBER 2006

Arbitration — Stay of proceedings — Lapse of time — Inherent jurisdiction of court to restrain limitation

Limitation — Arbitration — Lapse of time — Plaintiff applied to vary order precluding defendant from pleading and relying on defence of limitation

The plaintiff filed an action in the High Court on 18 January 1995 whilst the defendant held the view that the disputes should be referred to arbitration. It was finally disposed off by the Federal Court in favour of the defendant on 18 September 2000. The statutory period of limitation expired in 1998. The plaintiff sought under the inherent jurisdiction of this court for an order that the order of the High Court dated 9 September 1996 (staying the proceedings for the disputes to be referred to arbitration) as affirmed by the order of the Federal Court dated 18 September 2000 be varied by adding the proviso that the defendant be precluded from pleading and relying on the defence of limitation for the period between 17 May 1995 and 18 September 2000 in the arbitration proceedings (the starting date of 17 May 1995 represented the date the defendant first applied for a stay of proceedings whereas the closing date of 18 September 2000 represented the date the Federal Court disposed off the issue whether the proceedings ought to be referred to arbitration).

Held:

(1) The ratio decidendi in *Commissioner of the Federal Capital v Insurance Company of North America* [1968] 2 MLJ 143 (FC) applied to the instant case and it was binding on this court by virtue of the principle of stare decisis. The ratio decidendi in the *Commissioner*'s case may be stated as follows. That the High Court of Malaya had the inherent jurisdiction to restrain a defendant from setting up the defence of limitation at the arbitration proceedings if the following requirements were fulfilled: (i) that there were two forums (the court and the arbitration) with nominal jurisdiction to hear and resolve the dispute between the same parties; (ii) that the period of limitation had expired whilst the issue as to whether the disputes ought to be tried by the court or by way of an arbitration was still pending; and (iii) it was beyond the control of the plaintiff to avoid its claim from being time barred for purposes of the arbitration proceedings (see paras 16–17).

(2) On the argument that the *Commissioner*'s case was no longer good law with the introduction of s 28 of the Arbitration Act 1950, that section empowered the court to 'extend the time' where the arbitration agreement provided that a claim was time barred within a certain time frame. The concept of an extension of time was distinct from that of estoppel where a litigant may be estopped from pleading limitation (*Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141 (CA)). Section 28 dealt with an extension of time whereas the principle in the *Commissioner*'s case was one of estoppel (see para 30).

[Bahasa Malaysia summary

Plaintif memfailkan satu tindakan di Mahkamah Tinggi pada 18 Januari 1995 sementara defendan memegang kepada pandangan bahawa pertikaian-pertikaian tersebut seharusnya dirujuk kepada timbangtara. Akhirnya ia diselesaikan oleh Mahkamah Persekutuan yang memihak kepada defendan pada 18 September 2000. Had masa statutori berakhir pada 1998. Plaintif memohon di bawah bidang kuasa sedia ada mahkamah ini untuk suatu perintah bahawa perintah Mahkamah Tinggi bertarikh 9 September 1996 (penggantungan prosiding untuk merujuk pertikaian-pertikaian kepada timbangtara) yang dikekalkan oleh satu perintah Mahkamah Persekutuan bertarikh 18 September 2000 diubah dengan menambahkan proviso bahawa defendan dihalang daripada memplidkan dan bergantung atas pembelaan had masa untuk tempoh bermula daripada 17 Mei 1999 dan berakhir pada 18 September 2000 di prosiding timbangtara (tarikh permulaan 17 Mei 1995 mewakili tarikh defendan mula memohon satu penggantungan prosiding manakala tarikh berakhirnya pada 18 September 2000 mewakili tarikh Mahkamah Persekutuan menyelesaikan isu sama ada prosiding-prosiding tersebut harus dirujuk kepada timbangtara).

Diputuskan:

(1) Ratio decidendi di kes *Commissioner of the Federal Capital v Insurance Company of North America* [1968] 2 MLJ 143 (MP) terpakai dalam kes ini dan mahkamah adalah terikat menurut prinsip stare decisis. Ratio decidendi di dalam kes *Commissioner* boleh dinyatakan sedemikian. Bahawa Mahkamah Tinggi Malaya mempunyai bidang kuasa sedia ada untuk menahan seorang defendan daripada membina pembelaan had masa di prosiding timbangtara sekiranya keperluan-keperluan berikut dipenuhi: (i) bahawa terdapat dua forum (mahkamah dan timbangtara) dengan bidang kuasa nominal untuk mendengar dan menyelesaikan pertikaian di antara pihak-pihak yang sama; (ii) bahawa had masa telahpun tamat sementara isu sama ada pertikaian-pertikaian harus didengar oleh mahkamah ataupun melalui timbangtara masih berlanjutan; dan (iii) ia adalah di luar kawalan plaintif menghalang tuntutannya daripada keluar dari had masa untuk tujuan prosiding timbangtara (lihat perenggan 16–17).

(2) Mengenai hujahan bahawa kes *Commissioner* tidak lagi merupakan undang-undang yang baik dengan kemasukan s 28 Akta Timbangtara 1950, bahawa seksyen tersebut memberi kuasa kepada mahkamah untuk 'extend the

time' di mana perjanjian timbangtara memperuntukkan bahawa sesuatu tuntutan akan luput had masa dalam satu tempoh masa yang tertentu. Konsep lanjutan masa adalah berlainan daripada estopel di mana seseorang litigan dapat diestop daripada memplidkan had masa (*Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141 (MR)). Seksyen 28 adalah berkaitan dengan lanjutan masa sementara prinsip di kes *Commissioner* adalah estoppel (lihat perenggan 30).]

Notes

For cases on lapse of time in arbitration, generally, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2144–2146.

For cases on stay of proceedings, generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1486–1570.

Cases referred to

A'Court v Cross (1825) 3 Bing 329 (refd)

Accounting Publications Sdn Bhd v Ho Soo Furniture Sdn Bhd [1998] 4 MLJ 497 (refd)

Adnam v Earl of Sandwich [1877] 2 QBD 485 (refd)

Athappen a/l Arumugam v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1984] 1 MLJ 67 (refd)

'Avro International' The 'Avro Venture' 'Avro International' (Owners Of), The v Arabian Marine Bunkers Sales Co Ltd & Anor [1988] 1 MLJ 147 (refd)

Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd [2002] 2 MLJ 71 (refd)

Cholmondeley v Clinton (1820) 2 J & WI (refd)

Commissioner Of The Federal Capital v Insurance Company of North America [1968] 2 MLJ 143 (folld)

Compagnie Du Senegal, The v Woods And Company (1883) 53 LJ Ch 166 (refd)

EG Tan & Co (Pte) (in liquidation) v Tan Chong San [1993] 1 MLJ 256 (refd)

Hukam Chand-Bansi Dhar v Toyo Menka Kaisha Ltd 1940 AIR Lahore 576 (refd)

Kong Wah Housing Development Sdn Bhd v Desplan Construction Trading Sdn Bhd [1991] 3 MLJ 269 (refd)

Luchmee v Ranjeet 20 WR (Suth) 375 (refd)

Muhammad Mohideen Nachiar & Ors v Muhammad Naina Maracair & Ors 1938 AIR Madras 205 (refd)

Osmond v Kshitish Chandra 17 CWN 5: 16 CLJ 282: 26 IC 284 (refd)

RB Policies at Lloyd's v Butler [1950] 1 KB 76 (refd)

Sarawak Electricity Supply Corp v Celcom (M) Sdn Bhd [2002] 5 MLJ 490 (refd)

Scott v Avery (1856) 5 HLC 811, 10 ER 1121 (refd)

Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141 (refd)

Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2) [1970] 2 MLJ 226 (refd)

Swastika Scientific Engineering Co v The Union of India 1953 AIR Punjab 129 (refd)

Trans Resources Corp Sdn Bhd v Sanwell Corp & Anor (No 2) [1999] 2 MLJ 609 (refd)

Usahabina v Anuar bin Yahya [1998] 7 MLJ 691 (refd)

VOC Industrial Workers Co-operative Housing Society & Ors v M Karuppuswami 1978 AIR Madras 91 (refd)

Yew Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1 (refd)

Legislation referred to
Arbitration Act 1950 ss 6, 28
Civil Law Act 1956 s 3(1)
Courts of Judicature Act 1964 ss 23(2), 25(2)
Limitation Act 1953 s 6(1)(a)

Pang Kong Leng (Foong Chee Keong with him) (Cheah Teh & Su) for the plaintiff.
Sreether Sundaram (Murali B Pillai & Associates) for the defendant.

Abdul Malik Ishak J:

ENCLOSURE 46

[1] By this enclosure, the plaintiff sought under the inherent jurisdiction of this court and/or the liberty to apply implied in the order of the High Court dated 9 September 1996 as affirmed by the order of the Federal Court dated 18 September 2000 for an order that:

(a) the order of the High Court dated 9 September 1996 (staying the proceedings for the disputes to be referred to arbitration) as affirmed by the order of the Federal Court dated 18 September 2000 be varied by adding the proviso that the defendant be precluded from pleading and relying on the defence of limitation for the period between 17 May 1995 and 18 September 2000 in the arbitration proceedings (the starting date of 17 May 1995 represents the date the defendant first applied for a stay of proceedings whereas the closing date of 18 September 2000 represents the date the Federal Court disposed off the issue whether the proceedings ought to be referred to arbitration);

(b) the costs of this application be taxed and paid by the defendant to the plaintiff; and

(c) such other relief and/or order as this honourable court may deem fit and just.

FACTS OF THE CASE

[2] The chronology of events that led to the application in encl 46 will now be set out in accordance to the proceedings that took place in the High Court, Court of Appeal and the Federal Court. The proceedings by way of an arbitration and back again to the Federal Court would also be alluded to.

(a) Proceedings in the High Court

[3] Here, I shall refer to the specific dates and the events that occurred.

On 18 January 1995

The plaintiff commenced an action against the defendant for the sum of RM455,753.98 being the management expenses and commission due under the Fire, Marine Cargo and Miscellaneous Accident Insurance Underwriting Agreement ('the said agreement') between the parties dated 1 October 1980 (exh 'CWC-1' of

encl 45) which was terminated by the defendant in 1992 in the High Court (para 5 of exh 'CWC-2' at p 33 of encl 45). Clause 13 of the said agreement reads as follows (pp 18–19 of exh 'CWC-1' of encl 45):

> All disputes and differences which may arise between the contracting parties in respect of business ceded under this Agreement or the meaning of its conditions are to be settled by an equitable rather than a strictly legal interpretation of the provisions of this Agreement. Failing agreement between the parties they shall submit it to the decision of three Arbitrators, one to be named by each party and the third to be chosen by the two Arbitrators before entering upon the reference. In the event of failure by one of the parties to appoint an Arbitrator within thirty (30) days after having been requested to do so or if the Arbitrators fail within thirty (30) days of their appointment to agree upon the choice of an Umpire, such nomination shall be made by the President for the time being of the General Insurance Association of Malaysia ….

On 14 April 1995

The defendant entered an unconditional appearance (exh 'CWC-3' of encl 45).

On 2 May 1995

The plaintiff applied for summary judgment (exh 'CWC-4' of encl 45).

On 17 May 1995

The defendant applied for a stay of the proceedings in order to refer the dispute to arbitration (exh 'CWC-5' of encl 45).

On 21 June 1995

The senior assistant registrar allowed summary judgment to be entered (exh 'CWC-6' of encl 45).

On 26 June 1995

The defendant appealed to the High Court judge (exh 'CWC-7' of encl 45) against the summary judgment entered on 21 June 1995.

On 20 September 1995

The High Court judge allowed the aforesaid appeal and set aside the summary judgment (exh 'CWC-8' of encl 45) on the ground that the hearing of the plaintiff's application for summary judgment ought to have been postponed until after the disposal of the defendant's application for a stay of the proceedings (exh 'CWC-9' of encl 45).

On 17 Ocotber 1995

The plaintiff appealed to the Court of Appeal against the order dated 20 September 1995 (exh 'CWC-10' of encl 45).

On 13 December 1995

The senior assistant registrar dismissed the defendant's application for a stay of the proceedings.

On 14 December 1995

The defendant appealed to the High Court judge against the order dated 13 December 1995 (exh 'CWC-11' of encl 45).

On 9 September 1996

The High Court judge allowed the aforesaid appeal and ordered a stay of the proceedings (exh 'CWC-12' of encl 45) holding that the defendant's entry of an unconditional appearance did not constitute a step in the proceedings so as to bar the defendant from applying for a stay of the proceedings (exh 'CWC-13' of encl 45).

On 8 October 1996

The plaintiff appealed to the Court of Appeal against the order dated 9 September 1996 (exh 'CWC-14' of encl 45).

(b) Proceedings in the Court of Appeal

[4] Likewise here, the following specific dates and events were crucial.

On 4.1.1999

The plaintiff's two appeals in the Court of Appeal in respect of the application for summary judgment and the application for a stay of the proceedings were heard together.

On 21 April 1999

The Court of Appeal (with a coram of Gopal Sri Ram, Abdul Malek Ahmad and Haidar Mohd Noor JJCA) allowed both appeals with costs (exh 'CWC-15' of encl 45) and it held that the defendant's entry of an unconditional appearance constituted a step in the proceedings and barred the defendant from applying for a stay of proceedings (exh 'CWC-16' of encl 45).

(c) Proceedings in the Federal Court

[5] I will now refer to the following specific dates and the events that occurred.

On 21 May 1999

The defendant applied for leave to appeal against the decisions of the Court of Appeal dated 21 April 1999 to the Federal Court (exh 'CWC-17' of encl 45).

On 24 April 2000

The Federal Court (with a coram of Wan Adnan Ismail CJ (Malaya), Chong Siew Fai CJ (Sabah and Sarawak) and Mohamed Dzaiddin FCJ) granted leave to the

defendant to appeal to the Federal Court on the issue of whether the defendant's entry of an unconditional appearance constituted a step in the proceedings (exh 'CWC-18' of encl 45).

On 5 May 2000

The defendant appealed against the decision of the Court of Appeal dated 21 April 1999 to the Federal Court (exh 'CWC-19' of encl 45).

On 18 September 2000

The Federal Court (with a coram of Eusoff Chin Chief Justice, Wan Adnan Ismail CJ (Malaya) and Mohamed Dzaiddin FCJ) allowed the appeal and ordered a stay of proceedings and it held that the entry of an unconditional appearance did not constitute a step in the proceedings (exh 'CWC-20' of encl 45).

On 4 May 2001

The plaintiff applied to the Federal Court to review the decision that was made on 18 September 2000 on the ground that several other issues relevant to the appeal before the Federal Court were not addressed (exh 'CWC-21' of encl 45).

On 15 July 2002

The Federal Court (with a coram of Ahmad Fairuz, Chief Judge (Malaya), Siti Norma Yaakob FCJ and Denis Ong JCA) dismissed the aforesaid application for a review (exh 'A' of encl 48).

(d) The Arbitration Proceedings

[6] The relevant dates and events that took place may be stated in the following fashion.

On 30 August 2002

The plaintiff's solicitors issued a notice to the defendant's solicitors to refer the disputes to arbitration and appointed one of the three arbitrators and invited the defendant to appoint its arbitrator so that the two arbitrators may then choose the third arbitrator in accordance with the procedure as set out in the arbitration clause (exh 'CWC-22' of encl 45).

On 23 October 2002

The defendant's solicitors replied that the disputes need not be referred to arbitration since limitation has purportedly set in (exh 'CWC-23' of encl 45).

On 30 October 2002

The plaintiff's solicitors (being unaware of the letter dated 23 October 2002) suggested to the defendant's solicitors, on a without prejudice basis, that parties agree

to the appointment of a single arbitrator instead of appointing three arbitrators in order to save costs (exh 'CWC-24' of encl 45).

On 5 November 2002

Upon having sight of the letter dated 23 October 2002, the plaintiff's solicitors wrote to the defendant's solicitors to, inter alia, place on record that they did not agree with the matters as stated in the aforesaid letter (exh 'CWC-25' of encl 45).

On 19 November 2002

Not receiving any response from the defendant's solicitors, the plaintiff's solicitors issued a further reminder (exh 'CWC-26' of encl 45).

On 5 December 2002

The plaintiff's solicitors issued yet another reminder to the defendant's solicitors (exh 'CWC-26' of encl 45).

On 13 February 2003

The plaintiff's solicitors issued a further reminder to the defendant's solicitors (exh 'CWC-26' of encl 45).

On 11 June 2003

The plaintiff's solicitors wrote to the General Insurance Association of Malaysia ('GIAM') to ask for the identity of its President (exh 'CWC-27' of encl 45). This was necessary so that the plaintiff could write to the President of GIAM to appoint the second arbitrator in accordance with the arbitration clause.

On 12 June 2003

GIAM replied to the plaintiff's solicitors stating that it did not have a 'President' (exh 'CWC-28' of encl 45).

On 18 June 2003

The plaintiff's solicitors wrote to the defendant's solicitors again notifying the defendant that in the event it failed to appoint its arbitrator on or before 30 June 2003, the plaintiff will proceed to make the necessary application to the court based on such default (exh 'CWC-29' of encl 45).

On 30 July 2003

The defendant's solicitors reiterated that limitation has already set in and did not appoint its arbitrator (exh 'CWC-30' of encl 45).

(e) Proceedings in the Federal Court

[7] On 14 August 2003, the plaintiff applied to the Federal Court for the order of stay to be discharged on grounds that the defendant was not willing to do all things necessary to the proper conduct of the arbitration or alternatively for the order to be varied to preclude the defendant from raising the defence of limitation

(exh 'CWC-31' of encl 45). The application was made premised on, inter alia, the Indian authority of *VOC Industrial Workers Co-operative Housing Society & Ors v M Karuppuswami* 1978 AIR Madras 91. The headnotes of the case carry the following summary of the law (see pp 91–92 of the report):

> Under the provisions of s 34 of the Arbitration Act the court has jurisdiction to discharge an order of stay made by it earlier under it. (Para 5)
>
> It is well settled that what the court is called upon to do under s 34 of the Arbitration Act is to exercise a discretion, one way or the other, when an application is made before it for stay of the suit for ensuring the arbitration to be taken up. The court is by no means under a duty to stay suit even in cases where all the requirements of the section are fulfilled. This being so, to contend that the court could terminate the stay and resume the hearing of the suit only on being so moved by means of a formal application is not only to read a procedural technicality which is not found in the statute, but to mistake the nature and purpose of the whole machinery of stay under the section. (Para 6)
>
> The prime need of our court-system at the present moment is to reduce, as far as possible, the technicalities and refinements of procedure. This may not be possible of achievement in matters where the code or other relevant law lays down the procedure, in black and white. But where the codes are silent, there is, every reason for the courts to eschew procedural technicalities and get on with the job on hand. (Para 6)
>
> The court which granted the stay has every power to discharge the same either on the ground that the arbitration has become infructuous or on the ground that the parties are not intent upon getting their disputes properly decided in arbitration. AIR 1937 Sind 247; (1909) 4 Ind Cas 359 (Sind) and AIR 1921 Bom 458, Considered. (Para 7).

It makes sense that I should refer to other relevant authorities and I will do so now. In *Halsbury's Laws of Malaysia*, Vol 13 at p 39 at para 220.031, the following write-ups appear:

> Ready and willing to do all things necessary. The applicant, for a discretionary stay must satisfy the court not only that he is, but also that he was at the commencement of the proceedings, ready and willing to do everything necessary for the proper conduct of the arbitration.
>
> In the absence of any facts to the contrary, a simple assertion by the applicant that he is willing and ready to do so would suffice. The affidavit in support of the application for a stay must state that this is the case. A party may be 'ready and willing' within the meaning of this condition notwithstanding his contention that he has a perfect defence, such as that the time limit for reference to arbitration in the arbitration agreement has expired.
>
> Prior correspondence exchanged between the parties is relevant. Inferences may be drawn where there was delay in responding or agreeing to refer the matter to arbitration. The absence of a request for arbitration prior to commencement of legal proceedings would not of itself be construed as unwillingness on the part of the applicant to arbitrate. An act purporting to terminate the agreement containing the arbitration clause is not, per se, tantamount to demonstrating an unwillingness to have the matter resolved through arbitration.

In *Sarawak Electricity Supply Corp v Celcom (M) Sdn Bhd* [2002)] 5 MLJ 490, Ian Chin J, dealt with s 6 of the Arbitration Act 1952 in this way (see p 496 of the report):

> Under s 6 of the Act, one of the conditions which the defendant must satisfy is that they 'at the time when the proceedings were commenced and still remains ready and willing to

A do all things necessary to the proper conduct of the arbitration'. The defendant had demanded arbitration by their letter of 24 November 2000, and up to now had not followed up with action to name an arbitrator. Not only that, the defendant attempted to transfer away the shares, the subject matter of the dispute which the defendant wants arbitrated, which the court prevented by an injunction. Such conduct of the defendant exhibited an unwillingness to proceed to arbitration which belies the supposed willingness as conveyed
B by the letter. Such unwillingness persisted even up to now as the defendant has still to name the arbitrator.

In *The Compagnie Du Senegal v Woods & Co* (1883) 53 LJ Ch 166, Kay, had this to say (see p 169 of the report):

C I read them in a contrary sense, namely, that the Court has ample power to say that the matters in question ought to go to arbitration as the parties have agreed, but that pending the arbitration a receiver should be appointed or an injunction granted for the purpose of protecting the property. Otherwise there might arise this absurd consequence. Suppose there were a reference to arbitration, and then pending the arbitration circumstances should arise which might make it necessary to protect the property, there must, notwithstanding the
D general liberty to apply, which in these cases seems always to have been reserved, be another action instituted for the purpose of having a receiver appointed or an injunction granted to protect the property. Nothing of the kind is wanted. The orders which are made in these cases stay all proceedings in the action, but always reserve liberty to apply, not merely liberty to apply when an award has been made, but a general liberty to apply — that is, to apply at any time. An application made in pursuance of such a leave reserved is not a step in the
E action within the formal meaning of the word 'proceedings'. No doubt it is a proceeding in the action in a sense, and the Common Law Procedure Act, in effect, enacts that when an order is made staying proceedings, it is to be an order staying all proceedings. But then it is to be on such terms as to costs or otherwise as to the Court or Judge may seem fit, with this proviso, that any such rule or order may be discharged or varied as the Judge thinks fit. The section of the Act in terms contemplates the Court keeping the suit or action pending,
F and keeping the jurisdiction over the parties while the arbitration is going on, and that the order which it makes for referring the matter to arbitration may be varied pending the arbitration. I express my opinion explicitly, that in cases of this kind the fact that there is a cross motion for a receiver does not, even though a case for appointing a receiver has been made out, prevent the Court from appointing a receiver to protect the property, and, if the action merely comprises such matters as are within the arbitration clause, sending all the rest
G of the action to be determined by the arbitrator. There must be an order appointing the defendants, Messrs Woods & Co, receivers, and all further proceedings in the action must be stayed except for the purpose of carrying out such order, and there must be liberty to apply when the award is made, and, besides that, general liberty to apply at any time so as to enable any of the parties to make any application which may be necessary pending the arbitration.

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In *Muhammad Mohideen Nachiar & Ors v Muhammad Naina Maracair & Ors* 1938 AIR Madras 205, Horwill J, had this to say (see p 206 of the report):

I cannot however agree with the learned Subordinate Judge that the proper order to pass is 'adjourned sine die'. Clearly the Court ought not to renounce its powers and its duties in
I the disposing of the suit; and it is bound to exercise as much control as it can over the proceedings before the arbitrator. It is the duty of the Court to see that the parties do not delay the disposal of the arbitration proceedings and to see that as far as possible they prosecute those proceedings. I would therefore modify the order of the Subordinate Judge by granting an adjournment for one year from the last order of adjournment instead of sine die. It will then be open to the Subordinate Judge to adjourn the case to such further date

as he thinks necessary, if the parties have done all that they could to further the disposal of their dispute before the arbitration tribunal. Although the Courts below have not done any injustice to the parties, they have passed an order which is technically wrong. I therefore order both sides to bear their own costs in regard to this petition for stay in all three Courts.

In *Swastika Scientific Engineering Co v The Union of India* 1953 AIR Punjab 129, Kapur J, had this to say (see p 131 of the report):

I do not think that if once an application is made under s 34, the court making the order under s 34 becomes powerless and has to adjourn the case sine die and to leave it to the sweet will of one party or both the parties to do whatever they like with the conduct of arbitration proceedings and the original court becomes a powerless spectator till another court decides to set aside the arbitration agreement or decides on the validity of the award if and when it is made, and this is what the subordinate judge has decided and the respondents are contending before me.

Continuing on the same page, Kapur J, said:

(17) In *Russell on Arbitration* (1949 Ed), dealing with 'practice and procedure' the author has said at p 94.

> But nevertheless it is submitted that the court has power to vary or discharge such an order under the general jurisdiction of the court.

This in my opinion is a correct statement of the law because if this was not so the defendant can get the controversy taken to another court by making an application to that court after the matter is referred to an arbitrator. And the original court will have to hold its hand and be helpless till the award is given and its validity finally determined by another court to which an application, eg an application for extension of time under Sch 1 is made or any other application under the Act is made. In view of the opinion of the author of 'Russel on Arbitration' and the Madras case, the control remains with the court from where the stay was obtained and that court alone should be the court under s 2(c) of the Act. It would, in my opinion, be intolerable that the court which granted the stay of the suit should have no control and all proceedings should be transferred to the control of another court to whom an application after the arbitrators have been appointed is made. The scheme of the Act also shows the same. Under Chapter IV, where there is an arbitration in suits, the provisions of the Act are applicable, so also where an application is made under s 20 for filing an arbitration agreement.

In *Hukam Chand-Bansi Dhar v Toyo Menka Kaisha Ltd* 1940 AIR Lahore 576, Din Mohammad J, had this to say (see pp 576–577 of the report):

Counsel for the petitioner has next urge that the order of stay should not have been made as the respondent was not ready and willing to do all things necessary to the proper conduct of the arbitration as required by s 19, Arbitration Act. In support of this contention, he refers to the subsequent conduct of the respondent in not taking any step whatever in the matter of arbitration during the full one year that has elapsed since the order of stay was made. Counsel for the respondent however urges that the reason why no proceedings could be taken in the matter was that not only was this petition submitted by the petitioners, which re-opened the whole matter, but he had also instituted a regular suit against him, in which a summons was issued to him on 19 January 1939. The inactivity of the respondent so far may therefore be excused in these circumstances. But it cannot be said that he can indefinitely avoid the arbitration proceedings and thus abuse the order of the court staying the suit. Counsel for the respondent says that the order of stay made under s 19 is a

permanent order, which cannot be reviewed even by the court making the order and that that being so, it is not open either to the court below to revive the suit even if the arbitration proceedings are not carried on, or to this court to impose any condition on that order. I however do not agree. To concede the proposition advanced by the respondent's Counsel would evidently lead to a grave miscarriage of justice and countenance fraud.

A party to an arbitration proceedings may succeed in securing an order under s. 19 on the ground of his readiness and willingness to do all things necessary to the proper conduct of the arbitration and then after having obtained that order, may revolt and thus deprive the opposite side of a legal remedy for all time. This result could never be contemplated by law. An order staying the suit, if made on a fraudulent misrepresentation can certainly be reversed by the court making the order, if it is satisfied of the fraud and misrepresentation of the other side, and the suit can in the circumstances be revived. Similarly, this court is empowered under s 151, Civil PC, to make any order as may be necessary for the ends of justice or to prevent abuse of the process of the court. Nothing in the Arbi. Act bars this action. I accordingly direct that with a view to implement the assurance impliedly given before the order of stay was made, the respondent should see that the arbitration proceedings are carried out and finished within a reasonable time and in case of his default, it will be open to the petitioner to move the court below to review its order of stay and revive the suit. With these remarks I dismiss the petition. In the circumstances of the case however, there will be no order as to costs.

Now, all these authorities served as useful guidelines. On 2 August 2004, before the Federal Court, the plaintiff withdrew the application for the order of stay to be discharged upon the Federal Court expressing its opinion that the application ought to be made to the High Court instead of to the Federal Court and upon the defendant's oral undertaking at the hearing that it will appoint its arbitrator within 7 days (paras 34–36 of encl 45). Consequently, the Federal Court struck out the application with no order as to costs (exh 'CWC-33' of encl 47). It seemed that the defendant's counsel was taken to task by the Federal Court for not having appointed or agreed to the appointment of an arbitrator earlier.

GROUNDS IN SUPPORT OF ENCL 46

[8] It was emphasised that the said agreement between the parties was terminated by the defendant in 1992. It was also emphasised that since the plaintiff's claim was grounded in contract, limitation would set in six years from 1992 and it would end in 1998 (see s 6(1)(a) of the Limitation Act 1953 (Act 254)). There were two forums to be reckoned with. One, the courts and the other would be by way of arbitration proceedings with nominal jurisdiction to hear and resolve the disputes between the parties. The plaintiff filed the action in the High Court of Malaya whilst the defendant held the view that the disputes should be referred to arbitration. The proceedings in relation to the issue as to whether the proceedings in the High Court ought to be stayed for the disputes to be referred to arbitration depended on whether the defendant's entry of an unconditional appearance constituted a step in the proceedings so as to bar the defendant from applying for a stay of the proceedings. Now, at the material time, there was uncertainty in the law as there were conflicting authorities on that point (*Usahabina v Anuar bin Yahya* [1998] 7 MLJ 691). In fact, the issue was decided in favour of the plaintiff by the senior assistant registrar of the High Court and by the Court of Appeal. It was only finally disposed off by the Federal Court in favour of the defendant on 18 September 2000.

The statutory period of limitation expired in 1998 whilst the question of the appropriate forum to resolve the disputes was still pending disposal before the courts. To be precise, it was pending before the Court of Appeal at that time. At that time too, it was beyond the control of the plaintiff to do anything consistent with its legal rights in order to escape the consequences of its claim being barred by the effluxion of time. It goes without saying that the High Court has the inherent jurisdiction to vary the earlier order for a stay of proceedings by imposing a condition to restrain the defendant from raising the defence of limitation during the arbitration proceedings. A classic case in point would be the case of*Commissioner of the Federal Capital v Insurance Company of North America* [1968] 2 MLJ 143 (FC). The facts of that case may be stated as follows. There, the respondent, being the insurer for the appellant, was brought in as a third party to an action instituted by the Central Electricity Board against the appellant, claiming compensation for damage caused to certain electrical installations. Clause 7 of the contract of insurance reads as follows:

> If the company shall disclaim liability.... and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration.... the claim shall for all purposes be deemed to be abandoned...

The notice of disclaimer was then served onto the appellant on 12 March 1965. On 4 August 1965, the respondent applied for an order under s 5 of the Arbitration Ordinance 1950 to stay further proceedings until the differences between the appellant and the respondent were submitted to arbitration. The order was granted on 26 September 1966, that was, after the expiry of the contractual period of limitation. The appellant, by way of a motion, applied for a variation of the order to the effect that the respondent should be precluded from relying on the lapse of time between 4 August 1965 and 26 September 1966 in computing time for the purpose of pleading limitation under clause 7 of the contract as a defence to the claim in the arbitration proceedings. Gill J, dismissed the motion [1967] 2 MLJ 161. On appeal, the Federal Court with a coram of Barakbah LP, Suffian and MacIntyre FJJ, allowed the appeal and held that: (1) by virtue of s 3(1) of the Civil Law Ordinance 1956 and ss 23(2) and 25(2) of the Courts of Judicature Act 1964, the High Court has the inherent equitable jurisdiction to restrain a defendant from setting up the defence of limitation under a contract (or a statute) if the following circumstances were present: (a) two forums with nominal jurisdiction to hear and resolve a dispute between the same parties; (b) the statutory or contractual period of limitation should have expired whilst the question of the appropriate forum to resolve the dispute was pending; (c) it was beyond the control of the aggrieved party to do anything consistent with his legal rights to escape the consequences of his claim being barred by the effluxion of time; (2) since the conditions necessary for the court to exercise its inherent jurisdiction were present in this case, the court made an order to vary the order of 26 September 1966 in terms of the motion. At p 145 of the report, MacIntyre FJ delivering the judgment of the Federal Court had this to say:

> The conclusion, I have come to is that, if, the court has inherent jurisdiction to restrain a defendant from setting up the defence of limitation under a statute it must be deemed to have the power, in an appropriate case, to also restrain him from pleading limitation under a contract. The test for the application of the rule appears to be not whether the period of limitation is statutory or contractual, but whether the lapse of time was caused by circumstances beyond the control of the party concerned when he was actively pursuing his right of action in a court.

Incidentally, Suffian FJ in*Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2)* [1970] 2 MLJ 226, p 227 held the view that:

> In any event in every order of the court liberty to apply to the court is implied, without its being expressly reserved, *Fritz v Hobson* (1880) 14 ChD 542.

TO PUT THE FACTUAL MATRIX IN ITS CORRECT PERSPECTIVE

[9] The defendant disputed the plaintiff's submission that the Federal Court had on 14 August 2003 taken to task the defendant's counsel for not having appointed or agreed to the appointment of an arbitrator. The defendant suggested that the Federal Court merely advised that the defendant should not oppose the appointment of an arbitrator by the plaintiff. It must be recalled that under the said agreement between the parties (exh 'CWC-1' of encl 45), in the event of a dispute, both the parties would appoint its own arbitrator and the two appointed arbitrators would then appoint a third arbitrator. The plaintiff had, on its part, appointed its arbitrator and had asked the defendant to appoint its own arbitrator. The defendant refused to do so on the ground that the plaintiff's claim was allegedly time barred. The plaintiff then applied to the Federal Court to, inter alia, discharge the order for stay that was granted earlier as the defendant refused to even appoint its own arbitrator for the arbitration proceedings to commence. And at that point of time, there was no issue as to whether the defendant should or should not oppose the appointment of an arbitrator by the plaintiff. What the defendant eventually did was to undertake through its counsel during the hearing that it will appoint its own arbitrator within seven days. The defendant further suggested that the Federal Court merely pointed out that the issue of whether the defence of limitation was made out should be ventilated during the arbitration and it was on this basis that the plaintiff's application in the Federal Court was struck off. In response to this suggestion, the plaintiff submitted that the suggestion was not only untrue it was, in fact, mischievous. It was the judgment of this court that the defendant's suggestion was not reflected in the defendant's affidavits in encls 48 and 51. It was indeed a mischievous suggestion because if it was true, the present application in encl 46 would be barred by res judicata for the simple reason that the same relief has been asked for and refused by the Federal Court after a hearing proper. In reality, it was obvious that the application before the Federal Court was not argued because the application was struck out and not dismissed and no order was made as to costs. In any event, the proceedings in the Federal Court have no direct bearing on the determination of the present encl 46 before this court.

LIMITATION

[10] Both parties agreed that time for limitation started to run from the year 1992 when the said agreement between the parties was terminated. It was also not in dispute that limitation would have set in, in the year 1998.

[11] It is to put an end to litigation that stale demands should be frowned upon (*Cholmondeley v Clinton* (1820) 2 J & WI; *A'Court v Cross* (1825) 3 Bing 329, p 333; and *RB Policies at Lloyd's Butler* [1950] 1 KB 76). Thus, it is said that the plaintiff

should be vigilant and should act expeditiously in filing its suit against the defendant. There must not be an unreasonable delay on the plaintiff's part in advancing its legal right in a court of law. It must be borne in mind that the defendant should be in a position to know that by virtue of limitation, any stale claim would come to an end. It is for this reason that the legislature has laid down certain periods of limitation where after the expiry of which no action can be maintained. Lord Brightman in *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1 aptly said at p 5 thereof:

> When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken, discharge his solicitor if he has been retained; and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence.

In R B Policies at *Lloyd's v Butler* [1950] 1 KB 76, Streatfield J, spoke of the dilatory conduct of the plaintiff there in these words (see p 81 of the report):

> ... it is a policy of the Limitation Act that those who go to sleep upon their claims should not be assisted by the courts in recovering their property, but another, and, I think, equal policy behind these Acts, is that there shall be an end to litigation and that protection shall be afforded against stale demands.

[12] There must be a time limit for enforcing or claiming a right. It is for this reason that the Limitation Act 1953 (Act 254) prescribes different periods for various rights or claims to be enforced in a court of law. It must be borne in mind that a statute of limitation does not confer a right of action. It is enacted for the purpose of restricting the period within which the right might be asserted (*Luchmee v Ranjeet 20 WR (Suth) 375* (PC); and *Osmond v Kshitish Chandra* 17 CWN 5: 16 CLJ 282: 26 IC 284). The court in *Adnam v Earl of Sandwich* (1877) 2 QBD 485 states that a party who does not assert his own claim with promptitude has little or no right to seek the aid of the court. It is obvious that the law assists the vigilant and not those who sleep over their rights.

THE ARGUMENTS

[13] I will now consider the following arguments raised by the defendant, not in its order of merit.

(i) Whether a notice to refer disputes to arbitration without prejudice to appeal ought to have been used by the plaintiff?

This was proposed by the defendant but there was no authority advanced by the defendant to support such a proposition. To say as was said by the defendant that a litigant may issue a notice to refer disputes to arbitration on a 'without prejudice' basis cannot hold water. Such a contention would go against the decision of the Federal Court in the case of *Commissioner of the Federal Capital v Insurance Company of North America*. If such a 'without prejudice' notice can and ought to be issued, it should have been issued when a defendant applies for a stay of the court proceedings for the case to be referred to arbitration. Why should the defendant wait until the court decides on the application especially when the court may overturn it on appeal?

The defendant's contention, taken to its logical conclusion, would mean that:

(i) (i) in both the *Commissioner*'s case and the present case, the claimant ought to have acted 'prudently' and issued a notice to refer the disputes to arbitration without prejudice to the legal proceedings; and

(ii) that the Federal Court in the *Commissioner*'s case wrongly ordered that the third party be barred from pleading limitation for the period specified in the case.

(ii) Whether the ratio decidenci in the Commissioner's case applies to the present case at hand?

[14] The plaintiff relied on the *Commissioner*'s case and argued that that authority applied to the present case at hand. The defendant, on the other hand, argued that the *Commissioner*'s case stood in isolation.

[15] In arriving at its decision, the Federal Court in the *Commissioner*'s case referred to three old English cases where the courts restrained the defendants there from setting up the defence of limitation and the Federal Court held that the High Court of Malaya may exercise the equitable jurisdiction of the High Court of England pursuant to s 3(1) of the Civil Law Act 1956 and ss 23(2) and 25(2) of the Courts of Judicature Act 1964. MacIntyre FJ delivering the judgment of the Federal Court had this to say (see pp 144–145 of the report):

> In support of his application, he relies on cases in which the old High Court of Chancery in England had exercised its inherent jurisdiction to grant relief against 'hardship' caused by the lapse of time under the Statute of Limitation when a plaintiff was in the course of actively pursuing his right of action in the court itself. Those were cases in which the plaintiff had to decide whether to 'exhibit a bill' in the Court of Chancery or the Court of Common Pleas since mixed questions of law and equity were involved. Where he had chosen the Court of Chancery and the court had subsequently ruled that the appropriate forum was the Court of Common Pleas, it either retained the bill and directed an issue to be tried at law or dismissed the action, and left it to the plaintiff to institute fresh proceedings in the proper court. But in cases where, in the meantime, the claim had become barred by the Statute of Limitation, the court when directing, a bill to be retained and an issue tried at law as in *MacKenzie v Marquis Powis* (1737), 7 Brown. 282; 3 ER 183 or in dismissing the action with liberty to institute fresh proceedings as in *Sturt v Mellish* (1743), 2 Atk 611; 611; 26 ER 765 ordered, in the first case, that the defendant 'shall not be permitted to plead or insist on the Statute of Limitation', and, in the second, that 'time which has run during the pendency of this suit shall not be taken advantage of at law'. In *Sirdefield v Price* (1827), 2 Y & J 73; 148 ER 837, a bill was retained by a court of equity and leave was given to the plaintiff to bring an action at law in respect of a part of his claim on two promissory notes and an IOU chit. The plaintiff then brought the action in the Court of Common Pleas, whereupon the defendant pleaded the Statute of Limitation. The time, in fact, had run out on the first instrument before the bill was exhibited in the Court of Equity and in respect of the other two, afterwards. The plaintiff, thereupon, applied to the Court of Equity to restrain the defendant from pleading limitation and in making an order restraining the defendant from pleading limitation, Alexander LCB said:

> It would be in the highest degree unjust and would be contrary to all the practice of this court, and to the merits of the case, if the defendant were to be allowed to avail himself of the statute as to the last two notes.

The order made in that suit contained the following directions, namely: 'That the defendant be restrained from insisting at law upon the statute of limitation.' But where a bill had been exhibited in respect of a cause of action over which the Court of Chancery had no jurisdiction to adjudicate as in *Peeres v Bellamy* noted at 2 Vern 504; 23 ER 922 cited in *Gilbert v Emerton* (1705), 2 Vern. 504; 23 ER 922, in dismissing the bill, the court 'refused to direct that the Statute of Limitation should not be given in evidence' because the issue was a matter, exclusively, triable in law.

Counsel for respondent submitted that the decisions by the Court of Chancery in the cases above referred to were of no special significance, except, as matters of historical interest; and that since the passing of the Judicature Act of 1873 and the abolition of the High Court of Chancery, the High Court of Justice in England had not exercised that jurisdiction. However, once it is admitted that the Court of Chancery before the passing of the Judicature Act did exercise the jurisdiction, then it must also be admitted that all the powers so exercised vested in the High Court of Justice in England by virtue of s 16 of the Judicature Act of 1873. The relevant portion of the section reads:

> The High Court of Justice shall be a superior court of record, and, subject as in the Act mentioned, there shall be transferred and vested in the said High Court of Justice the Jurisdiction which at the commencement of this Act, was vested in, or capable of being exercised by all or any of the courts following (that is to say), (1) The High Court of Chancery etc

Section 16 was subsequently re-enacted as s 18 of the Supreme Court of Judicature (Consolidation) Act of 1925. But it is apparent that if the High Court did not exercise that power, it was because circumstances thereafter did not lend themselves to the exercise of that power. No more were litigants confronted with the problem of choosing the right court to bring an action. As for the High Court of Malaysia, the equitable jurisdiction of the High Court of England is vested therein by virtue of the provisions of s 3(1) of the Civil Law Ordinance and s 23(2) and s 25(2) of the Courts of Judicature Act 1964.

[16] The pertinent question to ask is not whether the *Commissioner*'s case stands alone in isolation as an authority but rather whether the ratio decidendi in that case applies to the facts of the present case. The ratio decidendi in that case certainly applies to the instant case and it is binding on this court by virtue of the principle of stare decisis.

[17] Simply put the ratio decidendi in the *Commissioner*'s case may be stated as follows. That the High Court of Malaya has the inherent jurisdiction to restrain a defendant from setting up the defence of limitation at the arbitration proceedings if the following requirements are fulfilled:

(a) that there are two forums (the court and the arbitration) with nominal jurisdiction to hear and resolve the dispute between the same parties;

(b) that the period of limitation has expired whilst the issue as to whether the disputes ought to be tried by the court or by way of an arbitration was still pending; and

(c) it was beyond the control of the plaintiff to avoid its claim from being time barred for purposes of the arbitration proceedings.

[18] The following germane observations must be advanced when perusing through the judgment of the Federal Court in the *Commissioner*'s case:

(a) (a) that in the *Commissioner*'s case there was a *Scott v Avery* (1856) 5 HLC 811, 10 ER 1121 clause found in clause 7 of the insurance policy, namely, that the insured — referring to the appellant, must refer a dispute to arbitration within 12 months failing which it is deemed abandoned;

(b) that there was also a proviso in clause 7 of the insurance policy and that was that an award against the insured — referring to the appellant, is a condition precedent to a claim against the insurer — referring to the respondent;

(c) that the insurer — referring to the respondent, had issued a notice of disclaimer and by the time the High Court ordered a stay of the third party proceedings commenced by the insured against the insurer, 12 months had already lapsed from the date of the notice of the disclaimer;

(d) that the Federal Court had to consider whether the High Court had jurisdiction over the case — the first requirement, and whether the limitation period expired whilst the application for a stay of proceedings was pending — the second requirement;

(e) that the Federal Court held that the limitation period has not even started to run let alone expired as the notice of disclaimer was bad; and

(f) that the Federal Court also noted that the *Scott v Avery* clause did not oust the jurisdiction of the High Court.

[19] In another part of his judgment in the Commissioner's case, MacIntyre FJ had this to say (see p 147 of the report):

> Now assuming that I am wrong, and that the time did begin to run from the date of the service of the notice, the appellant was left with no other choice but to implead the respondent as a third party. The purpose of impleading a person as a third party is to enable the court to decide all the issues between the plaintiff and the defendant on the one hand and between the defendant and the third party on the other, in one and the same action. When the respondent was served with the third party notice, they had the option of either waiving their right under the Scott-Avery clause or applying to set aside the third party notice. They did not apply to set aside the third party notice. They must, therefore, be deemed to have waived their right under the clause and agreed to submit their dispute for adjudication by the court. They cannot now be permitted to resile from that position. They cannot, for instance, now be heard to say that they had not agreed to submit their dispute for adjudication by the court, as they had all along intended to invoke the provisions of s 5 of the Arbitration Ordinance. The proof that the court has assumed jurisdiction lies in the fact, that the respondent cannot rely any more on the contract to refer the dispute to arbitration but on the indulgence of the court. When, therefore, the court stayed further proceedings to enable the parties to go to the court of an arbitrator, a situation arose which, in my opinion, is analogus to the situation which prevailed when the old Court of Chancery referred an issue for trial before a Court of Common Law.

It is quite apparent that his Lordship MacIntyre FJ ventured to hold that in the event the notice of disclaimer was valid and that the 12 months' contractual limitation period started to run from the date of service of the notice, the insured failed to apply to set aside the third party proceedings and by failing to do so, had submitted to the jurisdiction of the court. It was for this reason that the first requirement was fulfilled. Although the reasoning for this finding may be open to criticism, yet the finding was without a doubt correct in law. It is trite law that an arbitration clause does not oust the jurisdiction of the High Court. An applicant for a stay of the court's proceedings for the disputes to be referred to arbitration pursuant to an arbitration clause does so by invoking the jurisdiction of the court to exercise its discretion to refer the matter for arbitration (*Kong Wah Housing Development Sdn Bhd v Desplan Construction Trading Sdn Bhd* [1991] 3 MLJ 269; and *Accounting Publications Sdn Bhd v Ho Soo Furniture Sdn Bhd* [1998] 4 MLJ 497).

[20] In the final part of his judgment, MacIntyre FJ in the *Commissioner*'s case had this to say (see p 147 of the report):

> Assuming once again that the notice of disclaimer is valid, it cannot be disputed that the period of limitation ran out while the hearing of the application by the respondent for a stay of proceedings was pending. In this connection, the court was blamed for the 'lamentable delay' in fixing an early date for the disposal of the application. There is nothing on the record to show that the blame lay on the court. When a case is adjourned generally for a date to be fixed, the first duty is upon the parties to apply to the registrar to fix an early date. There is nothing on the record to show what steps were taken by the parties to expedite the hearing. However, the argument that time would have been saved if the appellant had consented, in the first instance, to a stay of proceedings, is besides the point, since the appellant had in my opinion, good reason for opposing the stay at that stage of the proceedings. In the result, all the circumstances necessary to apply the old rule of Chancery is present in this case.
>
> The appeal will therefore be allowed. The order of court dated 2 June 1967 dismissing the motion dated 24 April 1967 is hereby set aside and an order is hereby made in terms of the motion, as amended by extending the last date in regard to the lapse of time to 13 June 1968, with costs to the respondents. The appellant to have the cost of this appeal.

Now, MacIntyre FJ finally held that on the assumption that the notice of disclaimer was valid and that time had started to run from the date of service of the notice, the limitation period expired whilst the application for stay was pending. Hence, the second requirement was also fulfilled. As regards the third requirement, the Federal Court in the *Commissioner*'s case held that although the insurer applied for a stay of proceedings yet the insured was entitled not to consent but to oppose the application as it had a good reason to do so. Here, in the instant case, it cannot be disputed that the plaintiff had good reasons to dispute the defendant's application for a stay and to pursue an appeal on the issue in question because the plaintiff was successful before the senior assistant registrar and before the Court of Appeal. I hasten to add that the facts in the *Commissioner*'s case are not entirely similar to the facts in the present case. In the present case, the plaintiff's claim against the defendant constituted the main claim itself and not by way of third party proceedings as was in the *Commissioner*'s case.

(iii) Whether the requirements in the Commissioner's case have been fulfilled?

(a) The first requirement

[21] The defendant contended for the very first time that the High Court did not have the jurisdiction to hear the disputes until and unless the arbitrators have made an award on the disputes. The defendant also submitted that the Federal Court in the instant case had decided that the defendant had not submitted to the jurisdiction of the court. This was obviously not true. What the Federal Court decided was that the question for determination was whether an entry of an unconditional appearance constitute a step in the proceedings within the meaning of s 6 of the Arbitration Act 1952 and that question was, in fact, answered in the negative (see exh 'CWC-20' of encl 45). The Federal Court did not decide the question of whether the defendant has submitted to the jurisdiction of the court. It is germane to mention that the court in ordering a stay of the proceedings for the disputes to be referred to arbitration does not have to decide the issue of the jurisdiction of the court or the lack of it. Put in another way, an applicant for a stay does not by so applying contend that the court does not have the jurisdiction to hear the disputes (*Trans Resources Corp Sdn Bhd v Sanwell Corp & Anor (No 2)* [1999] 2 MLJ 609). In fact, the court must first have the jurisdiction over the case in order to exercise its discretion to stay the proceedings for the disputes to be referred to arbitration. Had the defendant intended to challenge the jurisdiction of the High Court, it should have entered a conditional appearance and thereafter applied to strike out the writ of summons instead of entering an unconditional appearance and applying to stay the proceedings (*The 'Avro International' The 'Avro Venture' 'Avro International' (Owners Of) v Arabian Marine Bunkers Sales Co Ltd & Anor* [1988] 1 MLJ 147; and *EG Tan & Co (Pte) (in liquidation) v Tan Chong San* [1993] 1 MLJ 256). It was quite clear that the first requirement was fulfilled and that the defendant was merely raising a red herring by belatedly complaining about the lack of jurisdiction.

(b) The second requirement

[22] The defendant raised two main issues under this head, namely:

(i) before the limitation period expired in 1998, the High Court judge had already ordered a stay of the proceedings in 1996; and

(ii) when the limitation period expired in 1998, the only issue for consideration before the Court of Appeal and the Federal Court was not whether the disputes ought to be tried in court or by arbitration but rather whether the filing of an unconditional appearance amounted to taking a step in the proceedings under s 6 of the Arbitration Act 1952.

It is not in dispute that as at 1996 when the High Court judge ordered a stay of the proceedings, the limitation period has not expired as yet. It is also indisputable that in 1998 when the limitation period expired, the plaintiff's appeal against the order of the High Court judge was still pending. But as regards the question of whether the plaintiff was entitled to pursue its right of appeal that would be a different matter altogether because it comes under the consideration of the third requirement and not under the second requirement. Before the appellate courts — referring to the Court of Appeal and the Federal Court, it was not disputed that both these courts decided

on the issue of whether the filing of an unconditional appearance amounted to taking a step in the proceedings under s 6 of the Arbitration Act 1952. Clearly that issue would determine the outcome of the appeals which would in turn determine the question of whether the proceedings in the court should be stayed. In other words, that issue would determine the crucial question of whether the disputes are to be heard by the courts or by way of an arbitration. I am constrained to hold that the second requirement was also fulfilled.

(c) The third requirement

[23] The defendant argued that in the *Commissioner*'s case, the claimant could do absolutely nothing about the effluxion of time. The plaintiff, on the other hand, argued that the insured claimant in the *Commissioner*'s case could have issued a notice to refer the disputes to arbitration without prejudice to the court proceedings. However, as was stated earlier, such a 'without prejudice' notice was unheard of and was not issued in the *Commissioner*'s case as well as in the present case.

[24] The defendant was of the view that it was dragged into court to defend the plaintiff's claim, which claim the defendant had to deny liability but at the same time the defendant could not be seen to be actively pursuing an indemnity against the insurers. By way of a reply, this was what the plaintiff said. That the claimant insured was in fact actively pursuing an indemnity against the insurer by way of the third party proceedings.

[25] The defendant argued that time began to run insofar as the claim against the insurer was concerned and that there was nothing that the defendant could do about it without jeopardising the defendant's denial of the plaintiff's claim. The defendant also argued that the Federal Court in the *Commissioner*'s case held that the claimant's claim had yet to crystallise and that therefore the notice of disclaimer was bad and that time had not even begun to run. It was under these exceptional circumstances that the limitation period was extended. By way of a reply, the plaintiff had this to say. That in fact the Federal Court in the *Commissioner*'s case held that time had not started to run as the insurer's notice of disclaimer was bad and that had time started to run, it was proper for the claimant insured to bring the insurer as the third party. There was no mention by the Federal Court that on the assumption that time had started to run that 'there was nothing that the defendant could do about it without jeopardising the defendant's denial of the plaintiff's claim' as suggested by the defendant. It was not disputed that the Federal Court in the *Commissioner*'s case did hold that the notice of disclaimer was bad and that time had not started to run. The Federal Court also held that assuming that the notice of disclaimer was valid and that time had started to run and limitation had set in, the court still has the inherent jurisdiction to bar the insurer from pleading limitation at the arbitration hearing.

SYNOPSIS

[26] The defendant had contended that the plaintiff could have issued a notice to refer the dispute to arbitration without prejudice to the plaintiff's rights to pursue the matter all the way to the Federal Court. By way of a rebuttal, the plaintiff, inter alia,

pointed out that there was no authority put forward by the defendant in support of such a proposition. The defendant then argued that the plaintiff has not brought forward any case law that would negate the proposition that they could not have taken such a stand. Now, if the defendant's argument was to be accepted it meant that when 'A' puts forward an unsubstantiated proposition, the burden shifts to 'B' to rebut the proposition. With respect, such an argument borders on the absurd. The defendant relied on the case of*Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71 to purportedly support its proposition. It must be emphasised that the case of Bina Jati can readily be distinguished along the following lines:

(i) the notice to refer the disputes to arbitration in *Bina Jati*'s case was not issued on a without prejudice basis;

(ii) that further steps in the arbitration proceedings were said to have been taken on a without prejudice basis; and

(iii) that there was neither any ratio decidendi nor orbiter dictum in *Bina Jati*'s case that say that a party can issue a notice for arbitration or take further steps in the arbitration proceedings on a without prejudice basis as it was not raised as an issue by any of the parties.

[27] To accept the defendant's contention would be to encourage and worse, to compel duplicity of the proceedings. It would mean that a litigant would be obliged to sue in court and at the same time commence arbitration proceedings on the very same issues. The defendant contended that the ratio decidendi of the Commissioner's case was limited to the special facts of that case only. According to *Words And Phrases legally defined* Vol 4: R–Z, at p 7, the phrase 'ratio decidendi' has been defined to mean:

> The enunciation of the reason or principle upon which a question before a court has been decided is alone binding as a precedent. This underlying principle is often called the ratio decidendi, namely the general reasons given for the decision or the general grounds upon which it is based, detached or abstracted from the specific peculiarities of the particular case which gives rise to the decision. (26 *Halsbury's Laws* (4th edn) para 573).

Edgar Joseph Jr J (later SCJ) in *Athappen a/l Arumugam v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1984] 1 MLJ 67 at p 69 explained the phrase 'ratio decidendi' in this way:

> It is necessary to identify the ratio decidendi in *Karam Singh* [1969] 2 MLJ 129, a task which is not free from difficulty since although the decision was unanimous there were several judgments. In performing this task I have kept in the forefront of my mind two guiding principles which may be stated thus: 1. Where a case is argued on several grounds and the judge declares that he is deciding the case on more than one ground, each proposition on which he bases the decision will qualify as a ratio: *Jacobs v London County Council* [1950] AC 361. 2. It may happen in an appeal court that all the judges concur on the decision but each one gives different reasons for it. In such a situation, the only safe course is to follow the salutary advice of Lord Dunedin in *The Mostyn* [1928] AC 57, who said that if it is not clear what the ratio decidendi was, then it is not part of a later tribunal's duty to spell out with great difficulty a ratio decidendi in order to be bound by it.

According to Glanville Williams, *Learning the Law* p 75 (11th Ed, 1982):

> The phrase 'the ratio decidendi of a case' is slightly ambiguous. It may mean either: (1) the rule that the judge who decided the case intended to lay down and apply to the facts; or (2) the rule that a later court concedes him to have had the power to lay down.

And, finally, Rupert Cross & JW Harris, *Precedent in English Law* pp 65–66 (4th Ed, 1991) wrote as follows:

> There are... two steps involved in the ascertainment of the ratio decidendi.... First, it is necessary to determine all the facts of the case as seen by the judge; secondly, it is necessary to discover which of those facts were treated as material by the judge.

Now, two main issues were ventilated in the *Commissioner*'s case, namely:

(a) whether the limitation period has started to run against the insured in its claim for indemnity (which should be by way of arbitration proceedings) against the insurer; and

(b) if so, whether the insurer ought to be restrained from relying on the defence of limitation.

In deciding the first issue, the Federal Court held that it was of the view that the limitation period has not started to run because a claim for indemnity has not arisen yet and this was what the Federal Court said (see p 146 at para 'G' right hand column):

> Since liability was denied, a claim for indemnity could not have arisen under the contract. The appellant could not have gone to an arbitrator and claimed indemnity in respect of a liability which he denied.

The Federal Court then proceeded to decide the second issue by holding that time had started to run from the date of the service of the notice of disclaimer and this meant that the limitation period had expired whilst the application for stay was pending. So, the special facts in the *Commissioner*'s case as argued by the defendant are only relevant for the first issue and not on the second issue.

[28] The defendant further contended that as the insured in the *Commissioner*'s case was sued by the claimant in court and had to proceed by way of arbitration proceedings against the insurer, it would be 'nonsensical' for the insured to issue a 'without prejudice' notice in that case. With respect, it would be equally 'nonsensical' to have a 'without prejudice' notice to refer to an arbitration in the present case or in any other case for that matter. This is simply because such a notice is unheard of and has no legal effect whatsoever.

[29] The defendant also argued that in the *Commissioner*'s case, there was inconsistency between the insured defending the claim in court on the one hand and claiming for an indemnity against the insurer at the arbitration proceedings on the other hand. But, a careful reading of the *Commissioner*'s case will reveal that the 'special facts' about this purported 'inconsistency' were relevant only to decide the first issue (whether limitation has started to run) and not on the second issue (whether the insurer ought to be restrained from pleading limitation in respect of the period during which the issue of forum was being determined).

[30] The defendant also argued that the *Commissioner*'s case is no longer good law with the introduction of s 28 of the Arbitration Act 1950. Now, that section empowers the court to 'extend the time' where the arbitration agreement provides that a claim is time barred within a certain time frame. The concept of an extension of time is distinct from that of estoppel where a litigant may be estopped from pleading limitation (*Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141 (CA)). I must reiterate that s 28 of the Arbitration Act 1950 deals with an extension of time whereas the principle in the *Commissioner*'s case based on the three English cases is one of estoppel (see p 144 at para 1 (right hand column) to p 145 at para 'E' (left hand column). Thus, nothing turns by the introduction of s 28 of the Arbitration Act 1950.

CONCLUSION

[31] For the reasons as adumbrated above, I gave an order in terms of encl 46.

Enclosure 46 allowed.

Reported by Sally Kee